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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-20

VINCENT ALO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Vincent Alo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 19, 1971.

OPINIONS BELOW

The opinion of the Second Circuit, rendered on February 19, 1971, is reported at 439 F.2d 751, and is reprinted in the Appendix hereto, p. 1a, *infra*. An unreported memorandum opinion of the United States District Court for the Southern District of New York, denying a motion to dismiss the indictment, is reprinted in the Appendix hereto, p. 14a, *infra*.

JURISDICTION

On February 19, 1971, the Second Circuit entered its judgment affirming the judgment of conviction entered by the District Court following a jury verdict finding the petitioner guilty of the crime of obstructing the administration of the federal securities laws in violation of 18 U.S.C. § 1505. He was sentenced to imprisonment for five years on each of two counts, to run concurrently, and to a fine of $5,000 on each count.

Petitioner filed a timely petition for rehearing, requesting rehearing both by the panel of Judges hearing the appeal and by all the active Judges *en banc*. On April 26, 1971, the said panel entered an order denying rehearing. Eight days later, on May 4, 1971, an order was entered, signed by the Chief Judge, denying the petition for rehearing insofar as it requested rehearing *en banc*, "no active circuit judge having requested that a vote be taken on said suggestion." The foregoing judgment and the two orders respecting rehearing are reprinted in the Appendix hereto.

On timely application, Mr. Justice Harlan on May 20, 1971, signed an order extending the time for filing this petition for certiorari to and including July 3, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a post-indictment trial delay of nearly three years violates a federal defendant's right to a speedy trial under the Sixth Amendment where (a) the Government was at all times fully aware of the facts constituting the alleged offense yet presents no excuse or justification for the trial delay, and (b) the defend-

ant is found to have suffered no prejudice and no hampering in the preparation of his defense.

2. Whether the mere giving of false and evasive answers to questions put to a witness in a federal administrative proceeding constitutes an obstruction or impediment to "the due and proper administration of the law under which such proceeding is being had" within the meaning of 18 U.S.C. § 1505.

3. Whether a federal indictment is void for vagueness where the indictment (a) alleges that the defendant obstructed "the due and proper administration of the law" under which an administrative proceeding was being had in that he gave "false and evasive answers to questions put to him as a witness," but (b) fails to identify which of a large number of answers are considered false and evasive and fails to specify which answers are false and which are evasive.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .

Title 18, United States Code:

§ *1505. Obstruction of proceedings before departments, agencies, and committees*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any

committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On October 27, 1969, a two-count indictment was filed in the United States District Court for the Southern District of New York against the petitioner, Vincent Alo. The two counts differed only as to the days in-

volved, the first count referring to May 25, 1966, and the second count referring to May 26, 1966. App. A4-A5. Each count alleged that on the day in question

> ". . . the defendant, did unlawfully, wilfully, knowingly and corruptly obstruct and impede and endeavor to obstruct and impede the due and proper administration of laws of the United States, to wit, the Securities Act of 1933 and the Securities Exchange Act of 1934 as amended, under which a proceeding, to wit an examination and private investigation entitled 'In the Matter of Tel-A-Sign, Inc.', before a department and agency of the United States, to wit the Securities and Exchange Commission, was then pending and being had, by giving false and evasive answers to questions put to him as a witness in such proceeding."

At the foot of each count was a reference to "(Title 18, United States Code, Section 1505)."

Following a four-day trial before the Honorable Constance Baker Motley, United States District Judge, the jury returned a verdict finding Alo guilty on both counts. The judgment of conviction was entered on October 27, 1970, and Alo was sentenced to terms of imprisonment of five years on each count, to run concurrently, and to a fine of $5,000 on each count. Alo was remanded and is presently serving his sentence, bail pending appeal having been denied both by the District Court and the Second Circuit. The Second Circuit affirmed the conviction on February 19, 1971, and rehearing requests were denied.

The relevant facts, as developed at the trial and in other proceedings in the courts below, may be chronologically summarized as follows:

A. The Warwick Hotel meetings—1964

In 1963, a Florida attorney, one Alvin Malnik, organized Scopitone, Inc., to manufacture and distribute a patented coin-operated movie machine known as "Scopitone." The shares of the corporation were in the names of two groups: (1) Malnik and his associates held 50% of the shares, and (2) Maurice Uchitel and three others [the "Uchitel Group"] held the other 50%.

In 1964, Scopitone, Inc., merged with Tel-A-Sign, Inc., a public corporation whose stock was traded on the American Exchange. Malnik handled the entire transaction for Scopitone, Inc., whereby Tel-A-Sign exchanged one-third of its shares for 80% of the outstanding stock of Scopitone, Inc. A dispute then arose between Malnik and the Uchitel Group as to whether the proceeds of the merger had been properly distributed among them. The Uchitel Group was aggrieved by the amount of Tel-A-Sign stock distributed to the four individuals constituting the Group.

The petitioner Alo had no stock interest in either Scopitone, Inc., or Tel-A-Sign, Inc., and was in no way involved in or benefited by the merger. App. 284. But Alo did know all of the individuals involved in the two contending groups. It was in his capacity as an acquaintance of all concerned that Alo arranged for two meetings of the Uchitel Group at the Warwick Hotel in New York City. Alo's subsequent failure to remember some of the details of these two meetings in 1964 was to form the basis of the 1969 indictment and 1970 conviction.

The various members of the Uchitel Group were called as witnesses by the Government in the trial of

petitioner in 1970. At that time, their memory of the two Warwick Hotel meetings was hazy as to details. But they were all agreed that Alo's role was simply to suggest that the disgruntled group settle the dispute between themselves and Malnik without resort to lawyers and litigation. Alo did little talking at the meetings since he knew little if anything about the dispute; the witnesses agreed that "Alo said at the meeting . . . that he wasn't fully versed in the particulars of this particular dispute, but all that he wanted to do was to bring his friends, if he could, together without litigation and expense." App. 284-285; 254. According to the witnesses, Uchitel "did virtually all the talking" at these meetings and it was difficult for the others to "get a word in edgewise." App. 251, 255.

Alo's efforts to bring the parties together at these two Warwick Hotel meetings were unsuccessful. Alo then dropped out of the picture; he never met again with the parties to discuss the Tel-A-Sign matter or the settlement of the dispute. App. 253. But at some later point the Uchitel Group did meet out of the presence of Alo and decided to settle "for what they could get." App. 270.

B. The S.E.C. inquiry—1966

Late in 1964 Tel-A-Sign filed a registration statement with the Securities and Exchange Commission, seeking to register about 90,000 unregistered shares of its stock then held by individuals. The S.E.C. thereafter ordered an investigation into matters relating to Tel-A-Sign's acquisition of Scopitone, Inc. In particular, the S.E.C. sought to learn "whether or not there were any undisclosed shareholders [of Tel-A-Sign] or

any principals who were not named in the registration statement." App. 97. The petitioner Alo and one Gerardo Catena were two individuals suspected by the S.E.C. of being undisclosed principals. App. 102. And, inasmuch as the settlement of the stock distribution dispute had been revealed to the S.E.C. in an amendment to the registration statement, the S.E.C. inquiry was also directed at the relationship of the Malnick and Uchitel groups and the terms of the settlement that had been reached. App. 102-103.

In May of 1966, the petitioner Alo was subpoenaed to testify before S.E.C. representatives regarding the Tel-A-Sign matter. At this point, Alo was approximately 62 years of age. App. 575. Accompanying Alo at the S.E.C. hearing was his attorney of some 44 years standing at the bar, Henry B. Chapman. Mr. Chapman actively participated as counsel in the proceedings and, as he later testified at the trial, he had advised Alo concerning his testimony as follows:

> "I told Mr. Alo that his response to any question put to him, unless he had a firm and definite knowledge and recollection of the events which would lead to the answer to the question posed, he was in no way to equivocate, speculate or say anything that he was not certain of; that it was perfectly proper for him to answer 'I have no present recollection' or 'I don't remember at this time' or some similar pattern of words." App. 436.

> "My only advice was to tell the absolute truth as he recalled it and, when he did not recall, either because of the lapse of time or because the matter was not of any importance, to rely upon my advice and to say that he had no present recollection or that was his best recollection, or some such similar pattern of words." App. 438-439.

The S.E.C. hearing covered two days, May 25 and 26, 1966. The transcript of that hearing was later read aloud to the jury at petitioner's trial in 1970. App. 327-421. That transcript reveals that Alo unequivocally responded to questions probing his relationships with the parties in question. App. 330, 331, 340. And he categorically denied that he or his family had any financial interest, disclosed or undisclosed, in either of the two corporations. App. 329, 330, 353, 371-380, 414-415. Similarly, Alo directly answered questions as to whether he had promoted or profited from the "Scopitone" machine. App. 384, 387, 388-391. He fully explained that he had attended the New York meetings at the request of Malnik to see whether a settlement with the Uchitel Group could be arranged. App. 335-338, 361, 370. Indeed, the S.E.C. attorney who testified at the trial admitted that Alo had provided the information that the S.E.C. investigators were most desirous of securing—the information as to Alo's own connection with the transactions and the names of the others involved in the discussions as to stock distribution. App. 141-142, 150-154. Alo has never been challenged as to the accuracy or truthfulness of his replies to such questions.

During the course of this two-day hearing, Alo responded fully and unequivocally to more than 500 questions, covering all the matters with which the S.E.C. was primarily concerned. But there were, by any fair count, somewhat less than 100 occasions on which Alo failed to recall some of the minutiae of the Warwick Hotel meetings or to remember precisely what was said at those meetings. Accepting his attorney's advice, Alo responded "I don't remember" or "I have no present recollection" to a substantial number of

such questions as to which he felt he had no firm knowledge or recollection. Such answers presumably formed the basis of Alo's subsequent indictment on the charge of having obstructed justice by giving false and evasive answers to the S.E.C. interrogators.

The Government told the jury (App. 527) and stated in its brief below (p. 7) that "134 times he claimed lack of recollection in testimony lasting not much more than an hour and a half," and the Second Circuit's opinion (Appendix hereto, p. 4a, *infra*) repeated the Government's numerical generality. That calculation, however, is not borne out by any fair reading of the S.E.C. transcript; nor does the number 134 emerge from the marked copy of that transcript supplied by the Government in response to Alo's request for particulars, wherein the responses questioned by the Government were bracketed in blue. Some of the "memory lapses" marked by the Government were cured by Alo in later portions of the hearing.[1] Other marked responses, apparently deemed false or obstructive in some manner, were quite responsive and unequivocal in nature and were confirmed at the trial by the Govern-

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[1] An outstanding instance of such curing of a "memory lapse" involved the several questions as to the name of the hotel in which the meetings took place. On the first day of the S.E.C. hearing, Alo responded "I just can't remember" when asked the name of the hotel. App. 334. But at the start of the second day's hearing, after refreshing his memory overnight, Alo corrected the record by identifying the Warwick Hotel as the place where the meetings occurred. App. 404. The Government made no attempt to bring this correction to the jury's attention, or to subtract the original answers from the calculation of 134 "memory lapses" mentioned to the jury. App. 527.

ment's own witnesses.[2] Many of the answers blue-marked by the Government were in response to the same questions repeated or asked in slightly different form. See, e.g., App. 342-343. Some of the questions themselves were confusing; others called for Alo's best recollection, if any. App. 333.

Any accurate accounting and appraisal of these so-call "memory lapses," which by any fair count were far less numerous than claimed by the Government, can only be achieved by a careful reading of both the S.E.C. and the trial transcripts. Suffice it to say that by any count they constituted no more than 15% of the total number of questions answered. And while it is impossible to say which answers the Government actually claimed were false or evasive, the following questions are typical of what was blue-marked by the Government in the transcript handed to Alo's counsel:

1. Have you ever heard of the corporation, "Scopitone"? App. 330. Alo responded he "might have heard of it" but didn't recall "any specific recollection of it." The S.E.C. interrogator later indicated his own confusion as to which corporation he was asking about, Scopitone, Inc., or Scopitone

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[2] Thus at one point in the S.E.C. hearing Alo was asked, "Was anyone else present at this time when Mr. Malnik contacted you to discuss this matter?". Alo's answer, marked in blue by the Government, was "No." App. 338. No attempt was ever made to prove this answer false.

Similarly, the Government marked as evasive or false in some manner the following response by Alo: "He just told me about the stock distribution, that they had some differences, and just asked me to ask them to get together and settle this in a peaceful and nice way so they could avoid courts and lawyers, and so forth and so on." App. 342. This version of Alo's role was never proved false; indeed it was confirmed by the Government's own witnesses. App. 190, 245.

of Florida, Inc. App. 371-372. But the main focus of the foregoing question seemed to be in relation to the Tel-A-Sign merger with Scopitone, as to which Alo gave responsive answers. App. 331.

2. What was the name of the hotel? Whose hotel room was it? Was this hotel located on Central Park South? App. 334. Subsequently, Alo identified the hotel and thus in effect answered all these questions. App. 404.

3. Did anyone come in or out of this room while this meeting was being held? App. 335. Alo's failure to recall is an understandable one.

4. When did Mr. Malnik contact you for this purpose? . . . To the best of your recollection, the approximate date? . . . Was it a week before the meeting, a month before the meeting, to the best of your recollection? App. 337. Alo's failure to recall the date is understandable in view of the fact that both Alo and Malnik lived in Florida and saw each other frequently. App. 335.

5. Did Mr. Malnik indicate to you what the differences about the stock distribution between these men were? App. 342. But Alo had already stated that he had not been told the details, App. 341, and this failure to recall was merely confirmatory.

6. Did you ask anyone on your behalf to set up this meeting with Messrs. Green, Kaye, Miniaci and Whitel? App. 344. Alo responded that his memory was not clear as to such a detail occurring two years previously.

7. O.K. For example, did you ask a friend of yours to contact anyone in connection with the settlement of this matter during this time period? App. 345. This was another detail he could not remember.

8. Do you recall who arrived first of these four men? Do you recall if they all arrived at the same time?

App. 349. Neither Alo nor the Government witnesses could recall such minor details, and the S.E.C. interrogator agreed that if Alo didn't recall such details he should "so state for the record". App. 350.

9. Do you recall if anyone contacted you to go to that particular hotel on the day of the meeting? App. 351. Alo did not recall such a minor detail.

10. Did anyone else say anything at this meeting other than yourself and Mr. Uchitel? App. 354. Alo responded that he did not recall anyone other than Uchitel saying anything.

11. At this meeting did Mr. Uchitel state to you how the individuals obtained their shares of stock in Tel-A-Sign? App. 356. Alo's present recollection was that he did not remember, but he had already stated that he had not been told and did not know the details of the stock distribution.

12. Did Mr. Uchitel ask you why you were getting involved in trying to settle this? App. 358. Alo did not recall whether such a precise question was asked, but Alo had previously indicated that he was getting involved as a friend of all concerned.

13. You testified that you did not recall whether this meeting was held in the morning, afternoon or evening . . . Would it assist in refreshing your recollection to ask you the question whether there was any food served at this meeting? For example, was there dinner, breakfast or lunch served? App. 362. It would be difficult for anyone to recall such details as to such a meeting held nearly two years previously.

14. Do you know where in Miami Beach you told him this? App. 365. Alo's failure to recall is understandable in view of his frequent associations with Malnik in Florida.

15. How long did this meeting last? What was discussed at this meeting? App. 409. Alo responded that his memory was vague but he presumed that the discussion concerned the same things discussed at the first meeting.

16. Do you recall whether or not you paid for the room or suite? App. 410. The failure to recall such a minor and irrelevant detail is understandable.

17. But you don't recall what was said by whom to whom? App. 411. Such a general question would be hard to answer with certainty.

At the end of the hearing, Alo was given the opportunity to correct or change any such testimony, but no corrections or changes were in fact made. App. 420-421.

C. The suppressed indictment—1966

Several months after testifying at the S.E.C. hearing, Alo was called before a federal grand jury and questioned; he invoked his privilege under the Fifth Amendment and declined to testify. App. 11. It is also apparent, from the prosecution's pre-trial arguments, that various members of the Uchitel Group were also called before the grand jury "at about the same time that he [Alo] testified" before the S.E.C. and questioned with reference to the subjects of the S.E.C. inquiry. App. 18. And when the Government, during the trial in 1970, sought to impeach one of its witnesses by use of his grand jury testimony, it was clear that such testimony had been given in 1966. App. 269-270. Much of that 1966 grand jury testimony was supplied to Alo's counsel prior to trial, as the Government stated below in response to the petition for rehearing.

Such grand jury inquiries led Alo's counsel to suspect that an indictment may have been returned by the grand jury sometime in 1966 but never made public, and that the terms of the secret indictment were substantially identical to the 1969 indictment that led to Alo's conviction. That suspicion formed one of the predicates for Alo's pre-trial motion to dismiss the 1969 indictment on the ground that he had been denied his constitutional right to a speedy trial. App. 11. The prosecutor's response was "to concede for the sake of argument—and I haven't investigated all of the facts—but I am willing to concede for the sake of argument that there was a prior sealed indictment." App. 20. District Judge Weinfeld denied the motion without prejudice to renewal, but remarked that the suspicion if true "would be a rather remarkable state of affairs." App. 12.

Before the Second Circuit, the Government candidly referred to its agreement to the assumption "that there was a prior sealed indictment filed by a Grand Jury sometime in the latter part of 1966 which charged the same or similar criminal conduct as the indictment on which Alo was tried" and that the 1966 indictment "was never unsealed." Brief, p. 13. The Government's position, however, was "that the court should assume for purposes of this case that such a sealed indictment exists, but that its existence is not material to issues raised by the defendant." Brief, p. 13 fn. Thus the Government's position was that even assuming there was a sealed indictment in 1966 the ensuing three-year delay before trial in no way prejudiced Alo in terms of his right to a speedy trial, a position sustained by the courts below. See memorandum opinion of Judge Motley, Appendix hereto, p. 14a, *infra;* opinion of Second Circuit, pp. 7a-9a, *infra.*

The opinion of the Second Circuit (Appendix hereto, p. 7a, *infra*) commented on the peculiar position of the Government regarding the 1966 indictment:

> "Alo strongly urges that he was deprived of his sixth amendment right to a speedy trial. He claims that the 1969 indictment merely supplanted a substantially identical sealed indictment returned in 1966. Although the government has steadfastly refused to concede the existence of a 1966 indictment, neither has it denied Alo's contention. Both parties have argued the case on the assumption that such an indictment was returned, and we will do the same."

Moreover, before denying Alo's petition for rehearing *en banc*, the Second Circuit called for a response from the Government to that portion of the petition that renewed Alo's objection to the Government's persistent failure to concede or deny the existence of a 1966 indictment.[3] But the Government's response avoided any mention of the question whether there had been an indictment returned in 1966 and merely claimed that Alo's counsel had been fully supplied with the statements made "at a 1966 Grand Jury investigation," in compliance with 18 U.S.C. § 3500. There this strange matter now rests.

D. The vague and indefinite indictment—1969

The indictment returned against Alo in 1969 alleged in conclusory terms that he had obstructed the administration of the federal securities laws "by giving false

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[3] The petition for rehearing *en banc* requested that a hearing be ordered at which the facts concerning the 1966 indictment could be developed. During the oral argument before the Second Circuit panel that decided the case Government counsel was asked at least four times whether an indictment had in fact been returned in 1966, but no adequate answer was given.

and evasive answers to questions put to him as a witness" at the S.E.C. hearing. No specification was made in the indictment as to which answers were false or evasive or how many such answers could be so described.

Alo's counsel first moved for particulars. In response, the Government mailed Alo's counsel a copy of the entire S.E.C. transcript on which a substantial number of answers were bracketed in blue as indicative of what the Government would claim on trial were false and evasive. App. 15. Such "particulars," which did not specify which answers were false and which were evasive or in what respect the answers were false, proved inadequate to enable Alo to prepare a meaningful defense to specific charges of falsity and evasiveness.

Alo's successor counsel then moved to dismiss the indictment for failure to conform to the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure. App. 5. District Judge Weinfeld felt disposed to grant the motion because of the obvious lack of specifics in the indictment, but he finally ruled that Alo's previous motion for a bill of particulars constituted a waiver of any claim with respect to the indictment. App. 13-15. At the same time, after warning the Government never to draw "an indictment like this again and have it come before me" because "it wouldn't stand up," District Judge Weinfeld directed the Government to supply further particulars. App. 16-17. As to each answer, he directed,

> "Set forth whether or not you claim it is false, and then upon the trial you will have to show it was false; and also in what respect you claim the

answer was evasive. There is a difference between the two." App. 16-17.

In later affirming District Judge Weinfeld's denial of Alo's objections to the indictment, the Second Circuit indicated the nature of the Government's response to Judge Weinfeld's direction. That response took the form of a generalized assertion that unspecified answers were false in that "Alo in fact remembered the facts he claimed to have forgotten" and that unspecified answers were evasive in that "poor recollection was repeatedly invoked to avoid giving the SEC responsive answers." Appendix hereto, p. 11a, *infra*.[4] At the trial itself, the Government made no effort to prove or pinpoint which answers were false and which were evasive, and in what respects, despite District Judge Weinfeld's clear direction.

Moreover, the 1969 indictment, as returned by the grand jury, referred in the caption and in the body of the two counts to "VINCENT ALO, a/k/a Jimmy Blue Eyes." App. A4-A5. Upon Alo's motion to strike these prejudicial references to the alias, District Judge Weinfeld ruled that since there was no issue in the case as to the identity of Alo there was no justifica-

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[4] The second bill of particulars is reproduced at App. A6. It reads:

"1. It will be claimed that the defendant Alo gave false answers in that he in fact did remember facts responsive to the questions put to him where he disclaimed memory of such facts.

"2. It will be further claimed at trial that the defendant Alo gave evasive answers where he disclaimed memory or gave answers such as "My present recollection is, I do not remember that." (Transcript of May 25, 1966, p. 22) Or "I don't know, I don't recall . . ." (*Id.* at p. 31) and the like with a purpose to evade giving informative responses to the questions put to him."

tion for the "a/k/a" references in the indictment. Those references were stricken. App. A-4, A-5, 19.[5] Nevertheless, at the trial the Government insisted on bringing to the jury's attention, in the course of utilizing a witness' grand jury testimony to impeach that witness, a reference to Alo's alleged alias, "Jimmy Blue Eyes." App. 269-270. The Government was permitted to exploit this alias only after extended protest by Alo's counsel and a ruling by the trial judge that such a reference was not prejudicial since

> "Blue eyes are regarded as something beautiful in this society . . . . this term Blue Eyes is not in the category of, what was it, Benny The Bug or Machine-Gun Kelly. Blue eyes is not generally thought of as a derogatory term in this society and unless you bring out the fact that he was a prize-fighter and the blue eyes refers to his black and blue eyes from fighting, the jury will never know that." App. 266-267.

It need only be added that the one exhibit called for by the jury was the page of the grand jury testimony which contained the "Jimmy Blue Eyes" references and which had been introduced as a formal exhibit by the Government. App. 560, 563.

E. The trial and verdict—1970

The evidence submitted to the jury by the Government in support of the indictment consisted of the following:

(1) The testimony of an S.E.C. attorney, who was present when Alo was questioned, as to the background

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[5] Probably by inadvertence, the orders of the Second Circuit denying rehearing utilize the stricken caption reference to "a/k/a Jimmy Blue Eyes." See Appendix hereto, pp. 12a, 13a, *infra*.

and purposes of the S.E.C. inquiry. He conceded, on cross-examination, that the major areas of the S.E.C. inquiry had been answered by Alo.

(2) The testimony of the four members of the Uchitel Group as to what transpired at the Warwick Hotel meetings. All of them corroborated Alo's limited role at the meetings. In some respects, they were able to remember more of the details of the discussions than Alo could recall, but as to many of the incidental details of the meetings they exhibited a similar or even greater lack of recall.

(3) An oral reading before the jury of the entire transcript of the S.E.C. hearing. No effort was made to identify, during this reading or otherwise, the particular answers which the Government contended were false or evasive.

The sole witness presented by the defense was Henry K. Chapman, the attorney who accompanied Alo to the hearing and who advised him to plead a lack of recall whenever that was in fact the state of his recollection.

The Government at no point in the trial attempted to prove the falsity or evasiveness of any particular answer by Alo at the S.E.C. hearing. Rather, as indicated in its summation to the jury, the Government relied upon what it conceived to be the "incredible" failure of Alo to remember so many details of what transpired at the Warwick Hotel meetings years before the inquiry. After quoting some but not all of the "memory lapses," the prosecutor concluded his plea by suggesting that by "Mr. Alo's testimony and nothing more the government will prove that he obstructed justice. I just pulled out a few of these answers. It is 134 'I don't remembers' in a 99-page transcript." App. 527.

The court's charge to the jury imposed no duty to find any particular answer either false or evasive. The jury was simply told that, to find Alo guilty, it must find beyond a reasonable doubt "that the defendant Alo did corruptly obstruct or impede or endeavor to obstruct or impede this proceeding by giving false and evasive answers to questions put to him as a witness in this proceeding, and that he did so knowingly and wilfully." App. 540.

The jury's verdict was a simple one: "We find the defendant guilty of both counts." App. 572. No special verdict was rendered, and the jury made no findings as to which of the various answers were false and which were evasive.

F. The Second Circuit decision—1971

In affirming Alo's conviction on both counts of the 1969 indictment, the Second Circuit ruled:

(1) The evasive answers of a witness before an administrative agency constitutes an obstruction to "the due and proper administration of the law" administered by that agency within the meaning of 18 U.S.C. § 1505.

(2) Even assuming that there was a sealed indictment in 1966, there was no denial of Alo's right to a speedy trial since the three-day delay between that indictment and the trial did not prejudice Alo or hamper his capacity to present a defense. Moreover, said the court, prejudice for purposes of the Sixth Amendment's speedy trial clause cannot be presumed from such a delay; prejudice or at least the credible possibility of prejudice must be demonstrated by the defendant.

(3) The 1969 indictment was not void for lack of specificity as to the answers deemed false or evasive, particularly since the indictment was supplemented by two bills of particulars.

REASONS FOR GRANTING THE WRIT

The issues posed by the Second Circuit's decision are of critical importance not only to those concerned with the proper administration of federal criminal law but to all the countless individuals who are called upon to testify before federal courts and federal administrative agencies. The decision below, left unreviewed and uncorrected, poses a new and ominous threat to all such witnesses who articulate their honest inability to remember details of past events, even when properly advised by their counsel to testify only to those details that they can truthfully recall.

The Second Circuit, by a revolutionary *tour de force* of statutory construction, has literally created a new crime—that of a federal witness obstructing justice and the administration of law by the mere act of giving false and evasive testimony on the witness stand. The court has created that crime without adopting the protective rules of evidence that normally surround prosecutions for the act of giving false and evasive testimony, such as the "two-witness" requirement in perjury accusations. See *Weiler* v. *United States*, 323 U.S. 606 (1945). And it has imported this new crime of obstruction by false testimony into a narrowly drawn Congressional scheme designed to protect the witnesses themselves, as well as documentary evidence, from corrupt influences.

Equally egregious is the Second Circuit's notion that this new offense need not be demonstrated by proof

that any particular response by the witness was in fact false or evasive. And the Second Circuit apparently feels it unnecessary that the defending witness or the jury be apprised as to which of a series of "memory lapses" are deemed false or evasive. As this case demonstrates, this new offense is established if the witness has responded "'I don't recall" on numerous enough occasions to permit a jury or an appellate court to conclude that it is "incredible" to believe that the witness was not thereby giving false and evasive testimony and was not thereby obstructing justice.

The appropriateness of granting certiorari in this instance, however, goes beyond the Second Circuit's unwarranted exercise in creating a new federal crime of uncertain and elusive contours. That court has also rendered a decision that in several respects conflicts with decisions of this Court and of other Circuits. And it has imposed a most questionable limitation on the constitutional concept of a speedy trial, a limitation that is currently pending before this Court in another proceeding. *United States* v. *Marion,* No. 70-19, Oct. Term, 1971, jurisdiction postponed, 401 U.S. 934. These various factors, developed hereinafter, combine to justify this Court's grant of certiorari to review all aspects of the decision below.

Underlying this entire case, in addition, is the Government's lack of candor with reference to the existence of a secret indictment, supposedly returned in 1966. Such a matter deserves exploration by this Court. Cf. *Berger* v. *United States,* 295 U.S. 78 (1935).

1. Important problems are raised as to the constitutional right to a speedy trial, some of which are pending before this Court in the Marion case

The steadfast refusal of the Government to affirm or deny that the petitioner was indicted in 1966, shortly after his S.E.C. testimony, has placed the speedy trial problems in a unique posture. But those speedy trial problems are nonetheless appropriate for review by this Court.

If, as the Second Circuit was willing to assume, there was such a secret or sealed indictment in 1966, the ensuing three-year delay before the trial early in 1970 poses the following problems:

(A) Is such prosecutorial delay unreasonable or "purposeful or oppressive," *Pollard* v. *United States*, 352 U.S. 354, 361 (1958), for Sixth Amendment purposes where no valid excuse or reason for the post-indictment delay is demonstrated or even indicated? The precise scope of the terms "purposeful or oppressive" has never been delineated, but in *Dickey* v. *Florida*, 398 U.S. 30, 38 (1970), this Court condemned as "intolerable as a matter of fact and impermissible as a matter of law" a prosecutorial delay of nearly eight years, combined with prejudice to the defendant, where "no valid reason for the delay existed."[6]

It is difficult to avoid labeling the delay in this case as "purposeful" and "intolerable," a delay as to which the Second Circuit found that the Government "has offered no justification for its dalliance." Appendix hereto, p. 8a, *infra*. The Government obviously knew from the beginning all the facts and events that it deemed to be indictable and it presented those facts to

[6] In *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir. 1958), an unexcused delay of nearly four years was deemed an undue delay within the meaning of the Sixth Amendment even where no prejudice to the defendant had been shown.

a grand jury in 1966, long before the trial.[7] Not even an "institutional inefficiency," the lack of available prosecutors to try the case, has been advanced as an excuse for the delay. Compare *United States* v. *Marion*, No. 70-19, Oct. Term 1971, jurisdiction postponed, 401 U.S. 934, where such an excuse has been suggested. But if this prosecutorial delay be deemed no more than mere negligence, what Mr. Justice Brennan said in his concurring opinion in the *Dickey* case, 398 U.S. at 51-52, then becomes pertinent:

> "A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right [to a speedy trial] as a purposeful failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials."

Obviously, this problem of defining the unreasonableness of prosecutorial delay deserves fuller consideration by this Court. It is part of the matters that will be before this Court this coming term in the *Marion* appeal, *supra*, and simultaneously consideration of both this and the *Marion* situations might be deemed appropriate.

(B) Assuming this prosecutorial delay is deemed unreasonable or purposeful, must the defendant prove that he has in fact been prejudiced by the delay or can such prejudice be presumed? Here the Second Circuit has rejected the speedy trial claim mainly on its own feeling that Alo was in no way prejudiced by the delay. Appendix hereto, p. 8a, *infra*. But as Mr. Jus-

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[7] The 1966 grand jury testimony was apparently not repeated in 1969, when the second indictment was returned. The grand jury testimony used by the Government to impeach one of its own witnesses at the 1970 trial was testimony given before a grand jury in 1966. App. 269-270.

tice Brennan noted in his *Dickey* concurrence, 398 U.S. at 53, "concrete evidence of prejudice is often not at hand" and "it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses."[8] There is, in addition, no "ready way of establishing the prejudice to community interests from delay." *Ibid.*, 54.

It may well be, therefore, that the basic premise of the Speedy Trial Clause of the Sixth Amendment is that unreasonable delays are by their nature prejudicial and that it is not necessary in such situations for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. The Court of Appeals for the District of Columbia Circuit has so held, *Hedgepeth* v. *United States*, 364 F.2d 684, 687 (1966),[9] and the Second Circuit's express refusal

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[8] As was stated in *Ross* v. *United States*, 349 F.2d 210, 215 (App. D.C., 1965), "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter . . . . In a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice."

In the *Ross* case, the court had found a purposeful delay of seven months between offense and arrest.

[9] The court said in *Hedgepeth:* "The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. Of course, the likelihood of prejudice is undoubtedly an inevitable consideration in determining whether a particular delay is undue . . . . Prejudice is considered to be presumed from, or necessarily inherent in, a long delay. *Petition of Provoo*, 17 F.R.D. 183, 203 (D. Md.), affirmed *per curiam*, 350 U.S. 857 (1955)." 364 F. 2d at 687, fn. 3.

In *Hedgepeth*, the elapsed time between arrest and trial was slightly more than a year. The period between indictment and trial was a little over ten and a half months.

to accept that view in this case (Appendix hereto, pp. 8a-9a, *infra*) must be deemed to create a conflict.

Moreover, while the pending *Marion* appeal deals with pre-indictment rather than post-indictment delay, a critical issue in that case is whether prejudice must be proved or may be assumed from an unreasonable delay. As stated in the Solicitor General's jurisdictional statement (p. 8) in *Marion*, it is the Government's contention that even if the Government's inaction "were regarded as purposeful or oppressive, this still would not warrant dismissal of the indictment unless serious prejudice to the appellees were established." Whether that contention is valid as to post-indictment delays is essentially the question raised by the instant case. By considering the *Marion* case and this case together, this Court can effectively resolve the recurring problem of the degree of prejudice, if any, that must be demonstrated where there has been an unreasonable prosecutorial delay either before or after the return of an indictment.

The other possibility stemming from the Government's refusal to acknowledge the existence of an indictment in 1966 is that there was no such indictment. If that be the true situation, however, the foregoing problems are simply transferred into the context of a pre-indictment delay of approximately three years. Then the coincidence between this and the *Marion* case becomes virtually complete. Both cases should be resolved together.[10]

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[10] The sole question posed by the jurisdictional statement in *Marion* (p. 2) is: "Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendant." The pre-indictment delay in *Marion* was of approximately three-year duration.

But it should be noted that the Court postponed the question

2. By misconstruing the federal scheme designed to outlaw obstructions to the due administration of law, the Second Circuit has created a direct conflict with the Sixth and Ninth Circuits

The 1969 indictment alleged that Alo had obstructed the due and proper administration of the federal securities laws, in violation of 18 U.S.C. § 1505, solely in that he gave "false and evasive answers" as a witness in an administrative proceeding conducted by the S.E.C. There was no suggestion that Alo intimated or endeavored to influence any other witness who testified before the S.E.C., or that he concealed or falsified any documentary evidence relevant to the S.E.C. inquiry.

The statute involved, 18 U.S.C. § 1505, does not by its terms attempt to outlaw the giving of false and evasive answers in federal administrative proceedings. Section 1505 seeks only to reach certain types of obstructions of justice, such as coercing a witness or tampering with physical evidence, that interfere with the due administration of federal laws. By incorporating the giving of false and evasive answers into the statutory concept of obstructing the due administration of federal laws, the Second Circuit has rendered a result at war not only with established principles of statutory construction but with the legislative history of § 1505 and relevant decisions of the other Circuits.

To begin with, § 1505 must be viewed in conjunction with § 1503, which has a legislative ancestry going back to Section 2 of the Act of March 2, 1831, 4 Stat.

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of jurisdiction in *Marion* until the hearing on the merits. 401 U.S. 934. This indicates that there is a jurisdictional problem which, if resolved adversely to the Government, may make it impossible for the Court to reach the speedy trial problems.

487.[11] Section 1 of the 1831 Act had limited the power of federal courts to inflict summary punishment to cases of misbehavior in the presence of the court or "so near thereto as to obstruct the administration of justice."[12] Section 2 of the 1831 Act was an attempt to punish similar obstructions that might occur out of the presence or near-presence of the court. It was recognized that some obstructions, such as coercing witnesses and altering documents, would normally occur far away from the court room and that summary contempt powers could not reach such obstructions. Hence the penal provisions of what is now § 1503 were born.

Section 1505 was enacted in 1940 for the express purpose of extending to witnesses before House and Senate committees and before administrative agencies the protection which § 1503 had long extended to witnesses in federal courts. The House Judiciary Committee, reporting on the bill that became § 1505, pointed out that:

> "This proposed legislation simply extends the protection now provided by law for witnesses in Court proceedings, to witnesses in proceedings before either House of Congress or committees of

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[11] Section 2 of the 1831 Act provided penal sanctions for any person attempting to influence or intimidate any juror, witness or officer in any court of the United States in the discharge of his duty or, by threats or force, obstructing or impeding "the due administration of justice therein." 4 Stat. 487.

[12] Section 1 of the 1831 Act has been separately codified as 18 U.S.C. § 401.

The giving of false and evasive testimony in the court room would be misbehavior in the presence of the court and subject to summary punishment, *provided* that such testimony is found to be obstructive of justice. See *In re Michael*, 326 U.S. 224 (1945); *Ex parte Hudgings*, 249 U.S. 378 (1919); *Collins* v. *United States*, 269 F. 2d 745 (9th Cir. 1959); *Richardson* v. *United States*, 273 F. 2d 144 (8th Cir. 1959).

either House (or joint committees), and to witnesses in proceedings before administrative agencies of the Government.

"The need for outlawing intimidation and corruption applies to every witness. The noncourt witness is entitled to the same protection as is the court witness. There is no distinction or difference. The cause of justice requires that every witness should testify without fear or interference." H. Rep. No. 1143, 76th Cong., 1st Sess., p. 1.

Senator O'Mahoney, the chairman of the Senate Judiciary Committee and a sponsor of the legislation, gave this further explanation:

"At the present time, if a witness should be called before the Interstate Commerce Commission, some person not a witness before that Commission could with complete impunity threaten him that if he testified to the truth he would lose his job, for example, and there would be no recourse. This bill provides that, if any person should so threaten such a witness, such person would be guilty of a criminal offense not punishable by the Interstate Commerce Commission but cognizable in a court of law and punished by such court. That is all the bill does. It extends to witnesses before a committee of the House or the Senate, before a joint committee, or before a commission or board the same protection that is now thrown about witneses elsewhere." 84 Cong. Rec. 10912.

Thus, § 1505 was in no way designed to outlaw false and evasive testimony on the administrative witness stand. It was created in the precise image of § 1503, which in turn had been separated long ago from the original statute that had dealt in an entirely different section with the contumaceous act of testifying falsely

in the court room. Section 1505, like § 1503, was designed solely to protect witnesses and evidentiary material from corrupting and intimidating influences, influences that are of a different caliber than a witness' own oral testimony.

This complete and historic parallelism between § 1503 (relating to federal court proceedings) and § 1505 (relating to legislative and administrative proceedings)[13]

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[13] The parallelism between the two sections is readily apparent:

§ 1503	§ 1505
"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness, in any court of the United States, . . . or injures any party or witness in his person or property, . . . or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice [shall be fined or imprisoned, or both]."	"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any witness in any proceeding pending before any department or agency of the United States [or either House of Congress or joint committee] . . . or whoever injures any party or witness in his person or property . . . or whoever, with intent . . . to obstruct compliance . . . with any civil investigative demand . . . under the Antitrust Civil Process Act willfully removes . . . conceals, destroys, mutilates, alters, or by other means falsifies any documentary material . . . or whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States . . . [shall be fined or imprisoned, or both]."

serves to emphasize the questionable interpretation of § 1505 by the Second Circuit, which did not even consider the legislative history of that section, and to demonstrate the far-reaching consequences of that court's ruling. To wit:

(A) The plain language of both sections gives no basis for including within their sanctions the giving of false or evasive testimony on the witness stand. Nor does the legislative history support any such inclusion. To exclude such testimony from the reach of these sections is not to sanction or legitimatize them; false and evasive testimony has long been subject to appropriate contempt and perjury penalties arising out of legislative enactments distinct from either § 1503 or § 1505 or their predecessors. As the Second Circuit recognized, pp. 5a-6a, *infra*, a recalcitrant S.E.C. witness may be taken before a federal court, advised of his duty to furnish evidence, and held in contempt if he persists in his refusal to testify. 15 U.S.C. § 78u(c). Or such a witness may be prosecuted for perjury. 18 U.S.C. § 1621.

(B) Contrary to the established rules of narrow construction of criminal statutes and utilization of the *ejusdem generis* concept in reading a series of statutory phrases, the Second Circuit has misread and misapplied the broad catch-all language of § 1505 referring to "whoever corruptly . . . obstructs or impedes . . . the due administration of the law" under which the administrative proceeding is being had. The *ejusdem generis* rule provides that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class. See, e.g., *Garner* v. *Louisiana*, 368 U.S. 157, 168 (1961). And the preceding portions of § 1505 refer to only two specific types of obstruction: (1) attempts by others to

influence the testimony of witnesses either by actual or threatened coercion or by financial or other inducements; and (2) concealment or destruction of certain types of documentary evidence. The general "obstruction" language should thus be confined to similar types of interference.

The Second Circuit has refused to apply the *ejusdem generis* rule to § 1505. Appendix hereto, pp. 4a-5a, *infra*. It has thereby opened the door to prosecutions for any type of witness activity that a jury or court deems obstructive of the due administration of the law. In so ruling, the Second Circuit is directly in conflict with several rulings of the Sixth and Ninth Circuits dealing with almost precisely the same language in the parallel § 1503.

Thus in *United States* v. *Essex*, 401 F. 2d 214, 218 (6th Cir. 1969), the Sixth Circuit held that the act of filing a false affidavit in a federal court in support of an accused's motion for a new trial did not constitute an obstruction of justice within the meaning of § 1503. In refusing to broaden § 1503 "beyond the scope that Congress gave to it," the Sixth Circuit ruled (p. 218):

> "As a criminal statute 18 U.S.C. § 1503 requires strict construction. The general clause at its end, moreover, must be read to embrace only acts similar to those mentioned in the preceding specific language. Haili v. United States, 260 F. 2d 744 (9th Cir. 1958). Neither the language of Section 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice. If appellant committed any offense at all, it was . . . perjury . . ."

The Ninth Circuit has also read the § 1503 language dealing with the obstruction of "the due administra-

tion of justice" in the federal courts as limited by the *ejusdem generis* rule "to embrace only acts similar in nature to those acts enumerated by the preceding specific words"—which specific acts are identical to those specified in § 1505. *Haili* v. *United States,* 260 F. 2d 744, 746 (9th Cir. 1958); *United States* v. *Metcalf,* 435 F. 2d 754, 756-757 (9th Cir. 1970). Moreover, the Ninth Circuit in the *Metcalf* decision, 435 F. 2d at 757, rendered a further limitation on the broad "obstruction" language of § 1503 that is fully applicable to the "obstruction" provision of § 1505:

> "Moreover, the general provision, although it refers to the broad range of 'due administration of justice,' prohibits only specified types of impeding acts—*i.e.,* 'by threats or force,' or by threatening letter or communication.' Thus, not only must the broad term 'due administration of justice' be limited to pending judicial proceedings, but also the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions."

Needless to say, false or evasive testimony is not an intimidating act.

This conflict in the mode of interpreting virtually identical pieces of Congressional legislation merits the attention of this Court. And the importance of resolving that conflict comes from the very identity of the two sections, by which an authoritative or influential interpretation of § 1505 can serve as a precedent for the interpretation and application of § 1503, or vice versa. That is why the Second Circuit's decision has such far-reaching implications, touching not only witnesses in administrative and Congressional hearings but witnesses in the federal courts as well.

(c) Prior to the Second Circuit's decision in this case, there had not been a single decision upholding an indictment or conviction under either § 1503 or § 1505 in which the defendant was charged solely with having answered falsely or evasively as a witness.[14] The Second Circuit's opinion itself reveals both its uniqueness and its potential for mischievousness. That opinion openly confuses and equates the acts of burning one's files and testifying falsely or evasively, refusing to recognize that Congress has historically dealt separately with the prejurous and contemptuous implications of one's false testimony. Appendix hereto, p. 5a, *infra*. And the court has been frank to abandon, in its creation of this new crime, the "two witness" rule that accompanies prosecutions for perjury. Appendix hereto, pp. 5a-6a, *infra*. No standards of proof have been substituted in place of that "two-witness" rule other than the good but free-wheeling sense of judges and juries.

These are obviously matters that require the attention of this Court before they become embedded in the jurisprudence of § 1505 and of § 1503.

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[14] The few District Court decisions relied upon below by the Government are readily distinguishable. *United States* v. *Bonanno*, 177 F. Supp. 106 (S.D. N.Y. 1959), for example, sustained an indictment under § 1503 that charged that prospective witnesses had entered into an agreement to protect each other by testifying falsely and evasively; thus each witness was charged with inducing the other to alter his testimony. There was no allegation that either witness, apart from the inducement of the other, simply testified falsely or evasively. The *Bonanno* decision was reversed on other grounds, *sub nom. United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960). In *United States* v. *Cohen*, 202 F. Supp. 587 (D. Conn. 1962), the indictment charged a violation of § 1503 in that the defendant presented a falsified lease contract to a grand jury; but the indictment did not charge the defendant with simply giving false testimony himself.

3. The sustaining of the 1969 indictment, despite its lack of specificity as to the alleged false and evasive answers, directly conflicts with the principles of Russell v. United States, 369 U.S. 749.

The opinion of this Court in *Russell* v. *United States*, 369 U.S. 749 (1962), illuminates several respects in which the decision below falls short in maintaining the constitutional protection against vague and indefinite indictments. So serious are the deviations from the constitutional norms that it becomes appropriate for this Court to remind the federal judiciary once again that these basic norms permit of no exception.

(A) Particularly questionable in this case is the Second Circuit's attempt to brush aside petitioner's arguments respecting the validity of the 1969 indictment with the cavalier statement that there was little doubt in the court's mind that Alo "understood precisely what the phrase 'false and evasive answers' referred to." Appendix hereto, p. 16a, *infra*. What a court may think a defendant understands or what the defendant in fact understands would appear irrelevant to the thrust or the nature of the requirement that indictments by their own terms set forth all the elements of the alleged offense and apprise the defendant—without any uncertainty or ambiguity—of the nature of the accusation against him. See *Russell*, 369 U.S. at 765.

(B) In overcoming its own concession that "somewhat greater specificity would have been advisable" in this instance, the Second Circuit could point to only two so-called "specifics" in the indictment: (1) the broad charge, in the words of § 1505, that Alo obstructed the due administration of the federal securities laws; and (2) the equally broad charge, not found in § 1505 but said to be of a "fleshing out" nature, that

Alo obstructed by "giving false and evasive answers" at the S.E.C. proceeding.

But the *Russell* principles dictate that when guilt under a broadly worded statute depends upon a specific identification of fact, or a selection from among various factual possibilities, "an indictment must do more than simply repeat the language of the criminal statute." 369 U.S. at 764. Here, what was false or evasive, and hence what was thought to constitute an offense under § 1505, depended upon a specific identification of the challenged answers from among the hundreds supplied by Alo. Without such identification, the indictment must be considered void.[15] See *United States* v. *Agone,* 302 F. Supp. 1258, 1261 (S.D.N.Y. 1969), where Judge Frankel voided an indictment that failed to specify which of a substantial number of individuals was "the member of a labor organization" who was unlawfully intimidated; and see *United States* v. *Little,* 317 F. Supp. 1308 (D. Del. 1970), where an indictment was voided that alleged that the defendant refused to answer to the best of his knowledge "certain questions on schedules submitted to him" in connection with the 1970 census.[16]

[15] In the *Russell* cases, the various indictments were found void for failure to identify the matters under inquiry by the Congressional committees when certain questions were asked of the defendants. It was noted, however, that the questions that the defendants allegedly refused to answer "were then quoted verbatim under separately numbered counts." 369 U.S. at 753, n. 4. Such specification, the Court said, served to protect the defendants from again being put in jeopardy for the same offense. 369 U.S. at 764.

[16] A new and subsequent indictment in the *Little* case asserted that the defendant refused to answer "questions 8 through 12, inclusive, question A, questions H1 through H23, inclusive, and questions 13 through 41, inclusive." This indictment was validated, *United States* v. *Little,* 321 F. Supp. 388 (D. Del., 1971).

(C) The Second Circuit's last resort was to the two bills of particulars served by the Government. Appendix hereto, pp. 10a-11a, *infra*. But *Russell* makes that reliance unwarranted: ". . . it is a settled rule that a bill of particulars cannot save an invalid indictment." 369 U.S. at 770. Moreover, the two bills did nothing more than refer the petitioner to a variety of answers, some of them definite and many of them indicating a lack of present recall, leaving it to the defendant to wonder which particular answers were considered false and which were thought to be evasive.[17]

(D) The Second Circuit's validation of so vague and indefinite an indictment reopens all the evils that the *Russell* principles were designed to foreclose. Such an indictment reflects, among other things, a critical failure by the grand jury to perform its function under the Fifth Amendment of specifying what it conceived were the answers that were false and evasive and hence constituted the alleged violation of § 1505. It has left the prosecution free to fill in these vital missing elements and free to claim as false and evasive certain answers that the grand jury may have ignored in its deliberations. To borrow words from the *Russell* opinion, far from informing Alo of the nature of the false and evasive answers ascribed to him, "the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage

[17] The second bill of particulars (see footnote 4, p. 18, *supra*) gave two examples of what the Government said it would claim at the trial was evasive. The first instance was a failure to recall an incidental fact concerning the first Warwick Hotel meeting, whether Alo had called any of the participants by phone to set up this meeting. App. 343-344. The second example was a failure to recall how long Alo had spoken at the first meeting. App. 353. No other examples or answers were specified.

of each passing vicissitude of the trial and appeal." 369 U.S. at 768. And the prosecution has done just that in this case, emphasizing certain answers in its bills of particulars, referring to others in the course of trial, and shifting the emphasis to still other answers on the appeal. Neither the jury nor any court could determine from the indictment which version of Alo's alleged recalcitrance was really in issue.

The resulting confusion has made it impossible for Alo to know precisely what the accusations are or to formulate a meaningful defense thereto. And he has been further deprived of any protection against double jeopardy. Who can say which answers have been adjudged false and evasive, so as to permit Alo to plead such a conviction to bar another prosecution involving a particular answer? Has he, for example, been adjudged guilty of falsely not remembering the name of the hotel in which the meetings occurred, or could he now be prosecuted for perjury in connection with that answer?

Superimposed on the vague indictment, of course, is the fact that the giving of false and evasive answers is nowhere defined as a crime under § 1505. Without any statutory guidelines and armed only with the dubious notion that "I don't remember" is the necessary equivalent of a false or evasive answer, the prosecution and the jury were left free to speculate that so many such answers were given that it was "incredible" to believe that Alo was not guilty. No proof was required, no proof was offered, that any particular answer was false or evasive; the jury was simply given the entire S.E.C. transcript from which to speculate as it saw fit.

The amorphous nature of the indictment and the loose standards of guilt justified a full review of the de-

cision below. Indeed, the lack of specificity that permeates the indictment, the trial and the verdict is so complete as to raise a substantial question whether the verdict was totally deprived of evidentiary support, rendering the conviction void. See *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Washington* v. *United States,* 357 U.S. 348 (1958).

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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